

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOYOLA UNIVERSITY CHICAGO
Employer

and

Case 13-RC-164618

SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU) LOCAL 73, CLC/CTW
Petitioner

DECISION ON REVIEW AND ORDER

The Employer's Request for Review of the Regional Director's Amended Decision and Direction of Election is granted solely with regard to the Regional Director's inclusion of Department of Theology faculty in the unit found appropriate. Applying the Board's recent decisions in *Seattle University*, 364 NLRB No. 84 (2016) and *Saint Xavier University*, 364 NLRB No. 85 (2016), we find that the University holds out the faculty in the Department of Theology as performing a specific role in maintaining the University's religious educational environment.¹ As in those cases, a reasonable prospective applicant for a position in the University's Department of Theology would expect that the performance of their responsibilities would require furtherance of the University's religious mission. The record shows that faculty in the University's Department of Theology teach courses presented as having religious content; undergraduates may take those courses to fulfill core academic requirements; and faculty in the department have an expertise in Jesuit theology, other faith-based traditions, or other aspects of the religious experience. *Id.* slip op. at 3 in each decision. Accordingly, the Certification of Representative is amended to exclude faculty in the Department of Theology, and the University's Request for Review is denied in all other respects.²

¹ Our colleague advances arguments similar to those he made in his dissents in *Seattle University* and *St. Xavier University*. For the reasons given in those decisions, we are not persuaded by those arguments. In particular, we disagree with his view that *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), forbids the Board from making a distinction between faculty who teach religious and secular courses because this type of inquiry alone raises First Amendment concerns. To the contrary, excluding faculty in the Department of Theology does not mean that we have assessed the religious content of the courses they teach or otherwise compared the content of those courses to those taught by faculty in other departments. Rather, we have assessed only the University's presentation of those courses to the faculty, students, and public at large. *Seattle University*, 364 NLRB No. 84 (2016), slip op. at 2-3, n. 4-6; and *Saint Xavier University*, 364 NLRB 85 (2016), slip op. at 2-3, n. 3-5.

Although Member Pearce did not participate in *Seattle University* and *Saint Xavier University* and expresses no view as to whether they were correctly decided, he agrees to apply them as precedent in this case.

² The tally of ballots indicated that 142 voted for Petitioner, 82 voted against Petitioner, and with 12 challenged ballots. Because the number of eligible voters in the Department of Theology (14) plus the number the challenged voters (12) would not have affected the results of the election, our exclusion of all

ORDER

This case is remanded to the Regional Director for further appropriate action.

Dated, Washington, DC, March 16, 2017.

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Acting Chairman Miscimarra, dissenting.

Contrary to my colleagues, I would grant in its entirety Loyola University of Chicago's Request for Review of the Regional Director's Amended Decision and Direction of Election, in which the Regional Director asserted jurisdiction over the University and directed an election in a unit of all full-time and part-time non-tenure track faculty employed by the University in its College of Arts and Sciences. My colleagues deny review of the Regional Director's finding that the Board should exercise jurisdiction over most of the petitioned-for unit faculty; however, they grant review and reverse the Regional Director's assertion of jurisdiction over faculty in the Department of Theology. For three reasons, I believe there is a substantial issue regarding whether the Board lacks jurisdiction over the entire petitioned-for unit.

First, as I explained in my dissenting opinions in *Seattle University*, 364 NLRB No. 84, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), and *Saint Xavier University*, 364 NLRB No. 85, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), the distinction my colleagues draw between faculty who teach courses with “religious content” (who my colleagues find are exempt from the Board's jurisdiction) and the other petitioned-for unit faculty (who my colleagues find are subject to the Board's jurisdiction, presumably on the basis that those faculty teach courses with exclusively “secular” content) is forbidden by the main teaching of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Supreme Court emphasized that the “very process of inquiry” associated with this type of evaluation raises First Amendment concerns. *Id.* at 502.¹

unit faculty within that Department from the certified bargaining unit does not affect the Regional Director's certification of the Petitioner as the exclusive collective-bargaining representative of the remaining employees in the unit.

¹ My colleagues say that they have not assessed the religious content of the courses taught by faculty in the University's Department of Theology, but “only the University's presentation of those courses to the faculty, students, and public at large.” However, whether the content of a course is examined by looking at a syllabus distributed only to students taking the course or at publicly available documents is beside the point. Either way, it is the content of the course that is being evaluated. Assessing the University's “presentation” of a course means assessing the course's content as set forth in that presentation. See *Seattle University*, above, at 5 fns. 16-17 (Member Miscimarra, dissenting); *Saint Xavier University*, above, at 5 fns. 17-18 (Member Miscimarra, dissenting).

Second, as explained in my separate opinion in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 26–27 (2014) (Member Miscimarra, concurring in part and dissenting in part), when determining whether a religious school or university is exempt from the Act’s coverage based on First Amendment considerations, I believe the Board should apply the three-part test articulated by the Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Under that test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. *Id.* at 1343. In my view, Loyola University has clearly raised a substantial issue regarding whether it is exempt from the Act’s coverage under that three-part test. As stipulated by the parties, the University holds itself out to the public as providing a religious educational environment. Additionally, the University is organized as a nonprofit, and it is affiliated with the Catholic Church and the Society of Jesus. Accordingly, I would grant the University’s request for review because substantial questions exist regarding (i) whether the Board lacks jurisdiction over the University as a religiously affiliated educational institution, and (ii) whether the *Pacific Lutheran* standard is unconstitutional under the First Amendment. I would consider these jurisdictional and constitutional issues on the merits.

Third, even if one applies *Pacific Lutheran*, I would grant review because I believe there is a substantial issue regarding whether Loyola University is an exempt religiously affiliated educational institution on the basis that (1) it holds itself out as providing a religious educational environment (which has been stipulated to by the parties), and (2) individuals in the petitioned-for unit play a specific role in creating or maintaining the University’s religious educational environment. As to this last question, I believe substantial questions exist with respect to the specific role played by non–tenure track faculty, regardless of department, in providing students exposure to diverse viewpoints, which is an important aspect of a Jesuit education. See *Great Falls*, *supra*, 278 F.3d at 1346 (“That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.”); *Pacific Lutheran University*, *supra*, slip op. at 31 (Member Johnson, dissenting) (“The majority also errs fundamentally here by assuming a false dichotomy between ‘religious’ and ‘secular’ instruction.”).

For these reasons, I believe the Board should grant review of the Regional Director’s decision that the Board has jurisdiction over the petitioned-for non–tenure track faculty members. Accordingly, I respectfully dissent.

PHILIP A. MISCIMARRA, ACTING CHAIRMAN